TOPICAL INDEX

	Page
Jurisdiction of this Court	1
Questions Presented for Review	2
Statute Involved Herein	2
Statement of the Case	2
The Federal Constitutional Question Raised in State Court	3
Argument	3
Conclusion	4
Appendix "A"	1a
Appendix "B"	1b
Appendix "C"	1c

AUTHORITY CITED

	Page
Anderson v. Ott, 127 Cal. App. 122, 15 Pac. 2d 526, 11 Cal. Jur. 2d Sec. 228, page 648	4

IN THE

Supreme Court of the United States

No.....

CARL WHITSON,

Plaintiff,

vs.

VICTOR H. MINO, HOWARD CONRAD, and ALAMITOS LAND COMPANY, a California Corporation,

Defendants.

PETITION FOR WRIT OF CERTIORARI

To: the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Your Petitioner, who was plaintiff below, respectfully petitions this Honorable Court for a Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California, to review its decision affirming a Superior Court's judgment denying plaintiff a trial on the merits of an injunction and damage action. The opinion is not yet reported, but is found as Appendix "A" of Certified Record, filed herewith.

JURISDICTION OF THIS COURT

The jurisdiction of this Court to issue writs of Certiorari and review final decisions of state courts

is found in revised Rule 19 of the Supreme Court of the United States.

(I) On July 22, 1964, the Supreme Court of California made its order and judgment denying plaintiff a hearing in the case, hence the final order of the highest State Court. (Yellow page in back of Certified Record filed herewith).

(II) The District Court of Appeal, Second Appellate District of California affirmed the judgment on May 26, 1964, and made an order denying a rehearing on June 19, 1964. (Card on back page of Record)

(III) The statutory provision believed to confer on this Court jurisdiction to review the judgment and decree is Section 1257 (3) of Federal Code of Civil Procedure.

QUESTIONS PRESENTED FOR REVIEW

1. Is it taking property rights of a plaintiff without due process of law to deny him the right to a trial by jury and on the merits of a case under the due process of law clauses of the United States Constitution?

2. Can a summary judgment be used in such a manner as to deny a plaintiff the right to trial by jury, or a trial on the merits in a damage action?

STATUTE INVOLVED HEREIN

Section 437c Code of Civil Procedure, known as the summary judgment statute is involved herein, and is attached hereto as Appendix "B" as required by Rule 23(d) of this Court.

STATEMENT OF THE CASE

This case was started in the state court of California seeking an injunction against the defendants

from violating written setback provisions on two lots adjacent to an apartment house owned by plaintiff; and for $50,000.00 damages. Two of the defendants filed answers and later filed motions for summary judgment, which were not supported by affidavits as provided in Section 437c Code of Civil Procedure of California, but plaintiff did file affidavits which raised issues of facts. However, the trial judge granted a summary judgment and dismissed the action without a trial on the merits, or a jury trial. This judgment of dismissal was affirmed by the District Court of Appeal, Second Appellate District of California.

THE FEDERAL CONSTITUTIONAL QUESTION RAISED IN STATE COURT

The specific federal constitutional question of due process of law was first raised in the petition for rehearing in the District Court of Appeal, Second Appellate District, of California. (Appendix "C" attached hereto) This late raising of the federal question was caused by the surprise to plaintiff that the state judges would disregard the settled law of California and would affirm the judgment of dismissal on summary motion.

ARGUMENT

I

There can be no doubt that the violation of written deed restrictions in regard to setback provisions of city lots, and the building out front of the adjoining property owner and occupant is a damage of an actionable nature. A vested right of action is property in the same sense in which tangible things are prop-

erty and is equally protected against arbitrary interference, *Anderson v. Ott*, 127 Cal. App. 122, 15 Pac. 2d 526, 11 Cal. Jur. 2d Sec. 228, page 648.

It is urged that a right of action and the right to a trial by jury on the merits in a court of law is such a property right as is protected by due process of law and cannot be taken or abridged without doing violence to the Constitution of the United States.

II

It is further urged that, even though a summary judgment statute, such as Section 437c of the Code of Civil Procedure of California may be constitutional on its face as such, still the application or inforcement in such manner as to deny a plaintiff a trial on the merits, or by jury such actions violate the due process clause and equal protection clause of the Constitution of the United States and should not stand.

CONCLUSION

In conclusion it is respectfully urged that plaintiff has been denied due process of law and his property rights have been taken without due process of law; and that this honorable Court should issue a Writ of Certiorari so that the matter can be fully briefed and decided in due course.

Dated September....., 1964.

Respectfully submitted,

CARL WHITSON
In Pro. se. for Petitioner
3617 E. Ocean Blvd.
Long Beach, California

APPENDICES

APPENDIX "A"

PERTINENT PARTS OF DECREE BY THE DISTRICT COURT OF APPEAL

Second Appellate District
State of California

The Land Company demurred to plaintiff's second amended complaint; it was sustained without leave to amend and judgment was entered accordingly. Mino and Conrad moved for summary judgment in their favor. The motion was granted and judgment followed. Appeal was taken from each of these judgments.

It appears from the second amended complaint that the Land Company recorded the subdivision map not later than April 19, 1923, on which date it conveyed to plaintiff's predecessors in interest, Thomas F. Hickler and Jessie A. Hickler, lots 14 and 15 in block 40 of said tract. Said complaint (filed January 2, 1963) alleges that plaintiffs have owned adjoining lots 12 and 13 for 14 years, which means they acquired them about 1949 or 26 years after the original subdivision. In "recent months" defendants Mino and Conrad purchased lots 14 and 15 which adjoin 12 and 13 on the west. Plaintiffs had previously built two apartment houses on the lots "complying with all setback restrictions contained in the original deeds from defendant ALAMITOS LAND COMPANY . . . Plaintiffs live in the upstairs front apartment of the West building, and have . . . an unobstructed view of the

ocean, San Pedro Bay and Harbor, and the City Bluff Park on Ocean Avenue." Defendants are planning to construct a twelve unit multi-story apartment house on their lots located only five feet from the front property line alleged by plaintiffs to be "in total and flagrant disregard to the above named setback line restriction, which said restrictions were contained in the original deeds from the grantor, were on record and known to all the defendants herein at the time of the purchase of said lots."

The restrictions are set forth in the deed to the Hicklers and, as will be observed, are couched in terms of condition and not those of covenant. So far as here pertinent they read:

"To Have and To Hold, all and singular, the above described premises, . . . but subject to and only upon the following conditions, which parties of the second part, for themselves, their heirs, executors, administrators and assigns by the receiving of this deed hereby accept as conditions subsequent herein, to-wit:

"(a) That no building other than a dwelling house, flat or apartment house, private stable and necessary outbuildings shall ever be constructed or placed or permitted to be constructed or placed on any of the land herein conveyed. . . .

"(c) That no building of any description shall ever be constructed or placed or permitted to be constructed or placed on any of the land herein conveyed at a less distance than thirty feet from the front property line thereof. . . .

"(e) That the breach of any one of the foregoing conditions . . . shall work an immediate forfeiture of

the lots upon which such breach occurs; and the title thereto shall immediately revert to and become vested in the Alamitos Land Company, its successors and assigns, and they shall be entitled to forthwith enter thereon and take immediate possession thereof."

Plaintiffs sought judgment (1) enjoining defendants from constructing any building on lots 14 and 15 at a less distance than 30 feet from the front property line on Ocean Avenue; (2) declaring that any purported release or cancellation of setback lines does not affect any such lots; (3) in the event an injunction is denied and any building is constructed less than 30 feet from the front property lien, that plaintiffs be awarded $50,000.00 damages, and (4) for costs and general relief.

Though not specifically alleged the complaint raises the inference that the same conditions were inserted in the conveyance of each of the lots in the particular tract, but it is also apparent that nothing is said therein to the effect that those conditions are for the benefit of all lots in the tract or that they are to operate as covenants for the benefit of other lots or be enforceable as such by subsequent owners, also that the prescribed remedy for breach of same is forfeiture and reversion of title to Alamitos Land Company, the subdivider.

As will be shown the case of *Werner v. Graham*, 181 Cal. 174, controls this case and requires affirmance of the ruling upon the Land Company's demurrer.

In an effort to escape that conclusion the pleader asserts in paragraph I that:

"At the time plaintiffs purchased said lots [some 26 years after the deed to plaintiffs' predecessors, the

Hicklers], they were informed by the ALAMITOS LAND COMPANY and . . . believed that all other lots west of said lots had a setback restriction in the original deeds, including lots Fourteen (14) and Fifteen (15) Block Forty (40), which could not and would not be violated or annulled. That plaintiffs depended upon the agreement of ALAMITOS LAND COMPANY, and upon the recorded setback restrictions on Lots Fifteen (15) and Sixteen (16), Block 40, being complied with, and that no building could be or would be allowed closer than thirty (30) feet from the front property line on Ocean Avenue; that the grantor, ALAMITOS LAND COMPANY, had not and would not release or cancel any such setback restrictions, but would, when notified and called upon, enforce any and all setback line requirements. . . . .

Whitson's opposing affidavit says that before paying for lots 12 and 13 (which was years after the company imposed the restrictions upon the original buyer) he visited the office of the Land Company and learned that lots 14 and 15, as well as 12 and 13, of said Block 40 had setback restrictions in the deed and that "he depended upon said setback provisions and built his apartment houses. That he would not have bought said lots or built thereon except for the setback provisions in the original deeds to lots 14 and 15, Block 40, and the promise and agreement of ALAMITOS LAND COMPANY that any attempted violation would be stopped." Affiant also says that actual measurements show that none of the buildings in the block are closer than 30 feet to the street curb; that a former owner of lot 14, one Sid Spearman, had threatened, after plaintiffs' buildings had been con-

structed, to build closer than 30 feet from the sidewalk; that plaintiff had notified the Land Company of such plans and received a letter saying that it "would take actions to stop such violation upon payment by affiant of attorney's fees and costs, but Mr. Sid Spearman did not go ahead;" like notice and requests were given the Land Company by plaintiff with respect to defendants' plans "but no such actions were taken."

It will be observed that Conrad's declaration would raise a question of implied waiver of restrictions on the part of all other lot owners in the block and an expressed release and cancellation of same by the subdivider in whose favor the condition ran. It is clear that no equitable servitudes were created by the subdivider's deeds and hence waiver by individual lot owners, singularly or collectively, could not strengthen defendants' position. The same is true of the expressed cancellation of restrictions for, as above shown, it is legally inconsequential whether they had been cancelled; in any event they did not inure to the benefit of plaintiffs and could not be enforced by them. These observations also dispose of Rasmussen's declaration concerning cancellation of restrictions.

Whitson's affidavit is an effort to raise equities in his favor which would convert the deed conditions into equitable servitudes and to do this through acts and conduct of the subdivider which occurred long after its deeding of the lots in controversy. The *Werner* case, *supra*, precludes our adoption of any such theory.

The net result of the motion for summary judgment was that it presented only questions of law, just

like the demurrer to the complaint, and that the motion was of necessity solved as a matter of law and rightly granted.

The judgments herein are affirmed.

ASHBURN, J.*

We concur:

FOX, P. J.
ROTH, J.

THE COURT: This opinion is not for publication pursuant to the provisions of Rule 976, California Rules of Court.

* Retired Justice of the District Court of Appeal sitting pro tempore under assignment by the Chairman of the Judicial Council.

APPENDIX "B"

Sec. 437c — Summary judgment; claims of no merit to an action or no defense; affidavit; partial establishment of plaintiff's claim; appealable judgment:

In superior courts and municipal courts if it is claimed the action has no merit, or that there is no defense to the action, on motion of either party, after notice of the time and place thereof in writing served on the other at least 10 days before such motion, supported by affidavit of any person or persons having knowledge of the facts, the answer may be stricken out or the complaint may be dismissed and judgment may be entered in the discretion of the court unless the other party, by affidavit or affidavits shall show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact. A judgment so entered is an appealable judgment as in other cases. The word "action" as used in this section shall be construed to include all types of proceedings. The word "answer" as used in this section shall be construed to include counterclaims and cross-complaints. A motion filed pursuant to provisions of this section shall be construed as a pleading. * * *
(As Amended Stats. 1957, C.1457 p. 2780-1)

APPENDIX "C"

SUMMARY JUDGMENT

This Court has disregarded and overruled the settled law and cases in regard Summary Judgments, and held in effect that the Statute need not be complied with at all, as urged by defendants. Has held that the declaration of Howard Conrad in favor of the motion should be taken as true. Instead of following the settled law that affidavit of persons against whom motion is made *must* be taken as true.

Also the Court has held that Section 2015.5, Code of Civil Procedure makes a declaration the equivalent of an affidavit under Section 437c. It is respectfully pointed out that Section 2015.5 does not mention or name Section 437c, Code of Civil Procedure or specifically repeal the provisions thereof. It therefore cannot be controlling. Summary Judgment is a procedure governed exclusively by this Section 437c, *So. Pacific Co. v. Fish*, 166 Cal. App. 2d 353.

It is error to grant a Summary Judgment which deprives plaintiff of property rights without due process of law; and deprives him of the right to trial by jury as has happened in the case at bar.

SUSTAINED DEMURRER

It is error to sustain a demurrer without leave to amend the complaint for declaratory relief. *Maguire v. Hibernia, S. & L. Soc.*, 23 Cal. 2d 719, 728 (146 Pac. 2d 673, 151 A.L.R. 1062). This is true notwithstanding some judge or justice "assumes" that plaintiff has stated all his facts, and "assumes" that noth-

ing could be stated which would state a cause of action. Plaintiff was entitled to amend as a matter of law and to "assume" him out of court without a trial on the merits, is taking property rights without due process of law.

In any event, under the new Statute and procedure allowing a quick motion to dismiss, a demurrer is not proper against a complaint for declaratory relief.

And for sure the State Statute of California directs that an answer "shall" be filed against an amended complaint of any kind. No statute permits a demurrer to be filed against an amended complaint.

It is urged that errors have been made of a substantial nature, depriving plaintiff of a trial on the merits, or a jury trial, and depriving him of property rights without due process of law.

Respectfully submitted,

CARL WHITSON
Appellant in Pro. Per.